No. 84-849

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

COMMONWEALTH OF KENTUCKY, d/b/a BUREAU OF STATE POLICE - - Petitioner

versus

JAMES E. GRAHAM, JAMES D. GRAHAM, CHARLES McLAIN, FAY MANION, SHELBY MANION, ROSE ELLA McLAIN, JACK M. LOWERY, JR., DANIEL B. BOONE, and HOLLIS L. SEARCY - Respondents

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

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No. _____

COMMONWEALTH OF KENTUCKY, d/b/a BUREAU OF STATE POLICE - - *Petitioner*

v.

JAMES E. GRAHAM, JAMES D. GRAHAM, CHARLES MCLAIN, FAY MANION, SHELBY MANION, ROSE ELLA MCLAIN, JACK M. LOWERY, JR., DANIEL B. BOONE, and HOLLIS L. SEARCY - *Respondents*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RECEIPT OF PETITION

The Petition for Writ of Ceriorari was received by the Respondents on November 27, 1984.

OBJECTION TO JURISDICTION

The Court's rule 21.1 (b) provides that the Writ of Certiorari shall contain . . . "a list of all parties to the proceeding in the Court whose judgment is sought to be reviewed, except where the caption of the case in this Court contains the names of all parties."

The Petitioner has designated individuals and governmental units as Respondents, which are not parties

to this action and has totally failed to designate the true parties in interest, namely, Jack M. Lowery, Jr., Daniel B. Boone and Hollis L. Searcy as Respondents.

Rule 20.03 provides

> "The Clerk will refuse to receive any Petition for Writ of Certiorari which is jurisdictionally out of time."

The Opinion of the Sixth Circuit Court of Appeals affirming the award of attorney's fees to the Respondents, Jack M. Lowery, Jr., Daniel B. Boone and Hollis L. Searcy, was filed on August 30, 1984, and more than 90 days have elapsed since its entry. 28 U.S.C.S. § 2101 (c).

It is submitted that the Petition for Writ of Certiorari herein is defective, fails to comply with the Rules of this Court and should therefore be dismissed.

COUNTERSTATEMENT OF THE CASE

During the Oral Argument before the Court of Appeals, Judge Engel, in open Court, expressed the disappointment of the Court in the lack of candor exhibited by counsel for the Commonwealth. Unfortunately, this same lack of candor is repeated in the Petitioner's Statement of the Case to this Court and requires this brief Counterstatement.

In describing the constitutional violations inflicted upon the Respondents, James E. Graham, James D. Graham, Charles McLain, Shelby Manion, Faye Manion and Rose Ella McLain, the Petitioner states, "minor physical injuries were caused to James E. Graham." This is not a fair recital of the facts.

All three male Respondents, James E. Graham, James D. Graham and Charles McLain, were ordered out of the house at gun point and forced to lie face down in the yard. All were cursed and repeatedly struck with fists, flashlights and weapons. James E. Graham was beaten so severely that one of the officers finally shouted, "Get the old man out of here, it looks like he's dead." Charles McLain was repeatedly struck in the head and genitals even after he was handcuffed. All three male Respondents required hospitalization and James D. Graham was in the hospital for several days.

The female Respondents, Faye Manion, Shelby Manion and Rose Ella McLain, were also forced to lie face down in the yard. They were also threatened, cursed and abused. They were kept prisoners by the police mob for over five hours. One woman was forced to use the bathroom within sight of the state troopers.

The state troopers made a warrantless search of the Graham residence at approximately 9:00 p.m., during which they forced their way into the residence, threatened and struck James D. Graham. Shortly before midnight, they made a second warrantless search of the Graham residence, actually physically taking over the premises. The three male Respondents, James E. Graham, James D. Graham and Charles McLain, were beaten so severely that they were literally covered in blood, their facial features almost unrecognizable.

The Petitioner states that State Police Commissioner, Kenneth Brandenburgh, was not present and did not participate in these actions. This statement is

totally untrue. In Brandenburgh's deposition, presently on file in the Federal District Court, Brandenburgh admitted that he was present at the assembly point of the 40 or more officers as the second warrantless search was actually planned. He conceded that he personally went to the Graham residence, arriving there before the three male Respondents, James E. Graham, James D. Graham and Charles McLain, were removed from the scene. He admitted seeing these Respondents but denied anything unusual about their appearance. The unbelievable nature of this testimony is undisputably established by photographs showing these Respondents to be literally covered with blood. Even Brandenburgh concedes that he became aware that the three male Respondents required hospitalization that evening.

Despite the foregoing, Commissioner Brandenburgh at no time ever initiated disciplinary action against his subordinates. Instead, he publically published the so called Brandenburgh reports in which he sought to conceal and cover up the misconduct of the Kentucky State Police. For more than a year, he was able to conceal his participation and presence at the scene of the beatings.

It is interesting to observe that the Petitioner claims on the one hand that Brandenburgh was not present and did not participate in these actions and yet on the other hand, concedes that Brandenburgh was guilty of misconduct to the extent that the Commonwealth of Kentucky was unwilling to even furnish counsel in his behalf in this litigation.

The Petitioner refers to the Agreed Order of Settlement, which contains the language disclaiming fault as to any of the Defendants. The Petitioner completely neglects to advise the Court, however, that a second judgment clearly delineating the fault and liability of Commissioner Brandenburgh was filed at the same time and held in camera by the Court.

The most glaring misstatement of all is the assertion that the Order granting attorney's fees was entered ex parte by the District Court. On July 14, 1982, the Respondents filed a motion for an award of attorney's fees, together with a supporting memorandum and with notice to counsel for the Commonwealth. This motion can be identified as number 170 on the District Court's Civil Docket Sheet.

On August 11, 1982, counsel for the Commonwealth filed their response to this motion. This response may be identified as number 171 on the District Court's Civil Docket Sheet.

The matter was then taken under submission and on September 9, 1982, the Order was entered awarding attorney's fees and passing the case until November 2, 1982, for a hearing as to the amount of the fee. Thereafter, the Commonwealth was granted leave to file motions to vacate the attorney's fee award and these motions were considered by the Court. The Court did not enter its Order fixing attorney's fees until after both sides were afforded a full hearing, including the right to call witnesses and to cross-examine the Respondent attorneys. All of the foregoing is reflected in the Civil Docket Sheet of the District Court.

ARGUMENT

I. THIS DECISION IS NOT IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS OR OF THE SUPREME COURT OF THE UNITED STATES.

The Petitioner argues that certiorari should be granted because the holding by the Sixth Circuit in the case at bar is in conflict with the decisions of other circuits, specifically, *Morrison* v. *Fox,* 660 F. 2d 87 (3rd Cir. 1981); *Dean* v. *Gladney,* 621 F. 2d 1331 (5th Cir. 1980) cert. den., 450 U. S. 983, 101 S. Ct. 1521, 67 L. Ed. 2d 819 (1981), and *Berry* v. *McLemore,* 670 F. 2d 30 (5th Cir. 1981).

To be short about the matter, and simply stated, the Petitioner is in error when it asserts that there is a conflict between the case at bar and the cited opinions.

In each of the cited cases, the Plaintiffs sought to hold a governmental entity liable for the acts of subordinate employees on the basis of respondeat superior. In none of the three cases, were the Plaintiffs successful in establishing that the acts of the subordinates constituted an implementation of governmental policy. Not surprisingly, when the governmental agencies were dismissed as a matter of law, the Courts held that the Plaintiffs were not prevailing parties as to such governmental entities.

There is no conflict in the Sixth Circuit concerning these principles. *Jones* v. *City of Memphis,* 586 F. 2d 622 (6th Cir. 1978), cert. den., 440 U. S. 914, 99 S. Ct. 1230, 59 L. Ed. 2d 464 (1979), is almost identical to the cases relied on by the Petitioner.

In the case at bar, the Plaintiffs did not proceed upon any theory of respondeat superior. Commissioner Brandenburgh was sued individually and in his official capacity as the highest ranking official in the entire Kentucky State Police Bureau. As Commissioner Brandenburgh conceded in his deposition, (also on file in the District Court) his principle function was to make policy decisions for the Kentucky State Police. He was not a simple deputy sheriff or small town police chief. He was the Commissioner of the Kentucky State Police vested by the legislature of Kentucky (KRS 16.060) with broad policy making authority, including the prevention of crime and the maintenance of law and order throughout the Commonwealth.

Faced with these facts, the Sixth Circuit followed the clear holding of this Court in *Hutto* v. *Finney,* 437 U. S. 678, 98 S. Ct. 2565, 57 L. Ed. 2d 522 (1978). The clear teaching of *Hutto* is that when a policy making official of a state government is successfully sued in his official capacity, the state becomes liable for attorney's fees as part of the costs whether or not the state is a party to the litigation.

The Petitioner has failed to demonstrate any conflict between the federal circuits and has failed to suggest any "important question of federal law which has not been, but should be settled."

II. THE APPLICATION OF THE ATTORNEY'S FEE ACT IS NOT RESTRICTED TO CASES INVOLVING PROSPECTIVE OR INJUNCTIVE RELIEF.

The Petitioner argues that attorney's fees may be assessed under §1988 only in cases involving prospective relief. It is completely clear that this is a misstatement of the law. The Act itself provides that it applies "in any civil action." As this Court observed in *Hutto, supra,*

> "The Act itself could not be broader. It applies to 'any' action brought to enforce certain civil right laws."

Undoubtedly, the vast majority of cases that fall within the purview of §1988 do involve prospective relief. We would like to believe that only rarely would a Commissioner of a state's police force be personally involved in illegal searches, police brutality, and active concealment of the misconduct of his subordinates.

Federal law is well settled, however, that the awarding of attorney's fees is not restricted to cases involving prospective relief.

In *Scheuer* v. *Rhodes,* 416 U. S. 232, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974), a case arising out of the alleged wrongful death of certain students in the Kent State University tragedy, Mr. Chief Justice Burger observed in an unanimous opinion by the Court,

> *"In some situations a damage remedy can be as effective a redress for the infringement of a constitutional right as injunctive relief might be in another."* (emphasis supplied)

The plain fact of the matter is in the vast majority of police brutality cases, injunctive relief would be totally inappropriate. As was observed in *Milwe* v. *Cavuoto,* 653 F. 2d 80 (2nd Cir. 1981), a police brutality case,

> "Moreover, an individual damage action to redress instances of police misconduct is often the only tool reasonably available to vindicate society's interest in insuring that those who enforce the law also abide by it. (See authorities cited). Certainly, the vindication of an individual's civil rights, in an action against a state trooper, inures to the benefit of all citizens."

As another example of the broad application of §1988, in *Raney* v. *Jackson State College,* 551 F. 2d 672 (5th Cir. 1977), the Plaintiff obtained neither injunctive relief nor money damages. The Plaintiffs' recovery was limited to a simple declaratory judgment that he had been denied his First Amendment right of free speech by the officers and members of the board of trustees of the Institutions of Higher Learning of Mississippi. Nonetheless, the Court approved the award of attorney's fees to the Plaintiffs' attorney.

The foregoing authorities by no means exhaust the decisions authorizing the award of attorney's fees in cases in which the Plaintiff secures only money damages. We submit, however, that the foregoing are sufficient to establish that the award of injunctive relief is not a condition precedent to the award of attorney's fees under §1988.

III. THE QUESTION OF ATTORNEY'S FEES WAS PROPERLY DEFERRED UNTIL AFTER THE DECISION ON THE MERITS.

The Petitioner complains that since the Commonwealth was not consulted and did not participate in the settlement negotiations between the Respondents and Commissioner Brandenburgh, it is unfair that at a later stage in the proceedings, it was assessed attorney's fees.

The simple answer to this argument is that the Commonwealth had no standing to participate in this case on the merits, because of the immunity afforded it by the Eleventh Amendment and the Doctrine of Sovereign Immunity, which shielded it from any award of damages. Before *Hutto, supra,* and as early as *Fairmont Creamery Co.* v. *Minnesota,* 274 U. S. 70 (1927), this Court recognized that the award of attorney's fees was an "assessment of costs" rather than an award of damages.

This Court has also recognized that the question of attorney's fees is uniquely separable from the decision on the merits and cannot even be considered until one party has prevailed.

There is no need to paraphrase. Mr. Justice Powell wrote very clearly for an unanimous Court in *White* v. *New Hampshire Department of Employment Security,* 455 U. S. 445, 71 L. Ed. 325, 102 S. Ct. 1162 (1982),

> "Regardless of when attorney's fees are requested, *the Court's decision of entitlement to fees will therefore require an inquiry separate from the decision on the merits—an inquiry that cannot even commence until one party has 'prevailed' . . .*

> unlike other judicial relief, the attorney's fees allowed under § 1988 are not compensation for the injury giving rise to an action. *Their award is uniquely separable from the cause of action to be proved at trial."* See *Hutto* v. *Finney,* 437 U. S. 678, 57 L. Ed. 2d 522, 98 S. Ct. 2565 (1978). (emphasis supplied)

At the conclusion of the inquiry on the merits, the District Court conducted a separate hearing on the matter of attorney's fees at which hearing the Commonwealth of Kentucky was afforded the right to be fully heard.

CONCLUSION

For the foregoing reasons and authorities, the Respondents respectfully submit that the Petition for Writ of Certiorari should be denied.

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Counsel for Respondents

CERTIFICATE AND PROOF OF SERVICE AND OF MAILING FOR FILING

I hereby certify that three copies of this Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit were served upon Mr. David L. Armstrong, Attorney General, Mr. George M. Geoghegan, Jr., Assistant Deputy Attorney General, Capitol Building, Frankfort, Kentucky 40601-3494, and Ms. Cathy Cravens Snell, General Counsel, Justice Cabinet, State Office Building, Frankfort, Kentucky 40601, Counsel for Petitioner, by depositing them in a United States mail-box facility with first class postage prepaid, on this 10th day of December, 1984. All parties required to be served have been served. Forty copies of this Brief in Opposition to the Petition have been mailed for filing in this Court, addressed to the Clerk of the Court, on the same date and by the same method.

Jack M. Lowery

JACK M. LOWERY, JR.

Counsel for the Respondents